

**St. Joseph Hospital Corporation and Beverly J. Clanton; President of Local 2635, American Federation of State, County and Municipal Employees, AFL-CIO**

**Local 2635, American Federation of State, County and Municipal Employees, AFL-CIO and St. Joseph Hospital Corporation**

**Council 25, American Federation of State, County and Municipal Employees, AFL-CIO and St. Joseph Hospital Corporation. Cases 7-CA-15381, 7-CG-15(1), and 7-CG-15(3)**

March 8, 1982

### DECISION AND ORDER

On August 24, 1979, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondent St. Joseph Hospital Corporation and the General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge to the extent consistent herewith.

We agree with the Administrative Law Judge that St. Joseph Hospital Corporation, herein called Respondent, violated Section 8(a)(1) of the Act by maintaining and giving effect to an unlawful work rule prohibiting employees from making false statements,<sup>2</sup> but did not violate Section 8(a)(5) and (1)

<sup>1</sup> The Administrative Law Judge found that Local 2635, American Federation of State, County and Municipal Employees, AFL-CIO, Respondent in Case 7-CG-15(1), and Council 25, American Federation of State, County and Municipal Employees, AFL-CIO, Respondent in Case 7-CG-15(3), had violated Sec. 8(g) of the Act by engaging in the unlawful picketing of St. Joseph Hospital Corporation. No exceptions were taken to the Administrative Law Judge's findings in this regard.

The General Counsel has moved to sever Cases 7-CG-15(1) and 7-CG-15(3) from Case 7-CA-15381. In support thereof, he argues that Respondent Unions have agreed to and have in fact begun to comply with the Administrative Law Judge's recommended Order in those cases, all parties to these proceedings have been advised of the motion to sever and do not oppose the motion, and no exceptions have been taken to the Administrative Law Judge's findings in those cases. Additionally, the General Counsel points out that the remedies sought or obtained in both cases are not interrelated. As there is no opposition to the General Counsel's motion and no exceptions have been taken to the Administrative Law Judge's findings concerning the CG cases, and inasmuch as it appears that no prejudice will result to any of the parties from the severance of said cases, we shall grant the General Counsel's motion to sever the cases.

<sup>2</sup> In agreeing with the Administrative Law Judge that Respondent's work rule is *per se* unlawful because it prohibits, *inter alia*, the utterance of inadvertent or unknowingly false statements which the Board has held are protected within the context of concerted activity, we also note that said rule is overly broad in that it prohibits the making of such statements during an employee's nonworking time and while off company property. Accordingly, we find that Respondent's work rule is also unlawful for this reason. See *American Cast Iron Pipe Company*, 234 NLRB 1126 (1978), *enfd.* 600 F.2d 132 (8th Cir. 1979).

In joining his colleagues in this finding, Chairman Van de Water emphasizes that this rule evolved to protect employees who make a "false, though otherwise innocent, assertion, for instance, that employees of other employers were enjoying better (or worse) working conditions than

by refusing to process a grievance filed by employee Beverly Clanton<sup>3</sup> concerning her suspension. However, we do not agree with the Administrative Law Judge that Clanton's suspension violated Section 8(a)(3) and (1) of the Act nor do we agree with his finding that Respondent violated Section 8(a)(4) and (1) of the Act by enforcing the provisions of a collective-bargaining agreement against Clanton which thereby purportedly penalized her for having filed a charge with the Board.

The relevant facts are as follows: Since 1973, Respondent has had collective-bargaining agreements with Local 2635, of which Clanton was president, and Council 25, American Federation of State, County and Municipal Employees, AFL-CIO. In early May 1978,<sup>4</sup> Council 25 was engaged in efforts to organize certain of Respondent's technical employees and, in an attempt to aid Council 25 in its organizational drive, Clanton sought out the assistance and participation of other unions in a "demonstration" to be conducted on Respondent's premises. In furtherance of Council 25's objectives, Clanton, in conjunction with other union leaders, caused to be published under her name an article in the May 10 edition of Flint UAW News-Local 599 Headlight Edition which, in addition to seeking the support of UAW members in the upcoming demonstration, was highly critical of Respondent. The article, in part, stated that "the hospital administration has continually lied to, harassed, and even threatened to jail the union representative at St. Joseph's Hospital."

On or about May 18, Respondent's director of personnel and labor relations, Jerry Vogler, obtained a copy of this newspaper article and, after consulting with Respondent's president and its legal counsel, Vogler, on May 19, sent Clanton a mailgram<sup>5</sup> advising her that the demonstration scheduled for May 23 was unlawful under Section 8(g) of the Act, that Respondent viewed her call for the mass demonstration as "an irresponsible act," and that Respondent would "take appropriate action" to ensure that quality patient care would continue to be provided. On May 20, a local newspaper, the Flint Journal, published an article on the upcoming demonstration which identified Clanton as being involved in the demonstration.

It is undisputed that, on May 23, Respondent, as found by the Administrative Law Judge, was un-

Respondent's employees." *American Cast Iron Pipe Co.*, *supra* at 1129. He would not, therefore, construe this holding necessarily to protect egregious and maliciously false statements of employees.

<sup>3</sup> In his Decision, the Administrative Law Judge frequently refers to Clanton by her maiden name, Carr.

<sup>4</sup> All dates hereinafter are in 1978, unless otherwise indicated.

<sup>5</sup> The text of the mailgram is fully set forth in the Administrative Law Judge's Decision, sec. III.A.2.

lawfully picketed by the Unions herein as well as by several other labor organizations. Among those engaged in the picketing on behalf of Local 2635 were Clanton and employees Daryl Bergeron and Trudy Langford, both of whom, like Clanton, were union officials.<sup>6</sup>

On May 26, the day after the election which Council 25 lost, Vogler individually advised Clanton, Bergeron, and Langford that he was considering taking disciplinary action against them<sup>7</sup> and would, upon returning from his vacation and after reviewing the facts and consulting with Respondent's counsel, inform them what disciplinary action, if any, would be taken. Upon his return from vacation on June 5, Vogler reviewed the matter with Respondent's attorney and its president. They decided to discipline only Clanton. Vogler testified that Respondent chose not to discipline Bergeron and Langford because it was "not able to show through the evidence that they had organized, or been a leader in the picketing that occurred. . . ."

Thereafter, at a meeting held on June 7, and attended by Vogler, Clanton, Clanton's union representative, Sandra Lynn, and Respondent's supervisor, Cliff Kittle, Vogler handed Clanton a letter advising her that she was being suspended for 2 weeks for having violated the "no-strike" clause of its collective-bargaining agreement<sup>8</sup> and for having violated Respondent's rules prohibiting employees from making "vicious, false or malicious statements about employees of the Hospital." However, because of her good work record, Clanton was not required to serve out the 2-week suspension but a record of the disciplinary action was placed in her personnel file. Clanton thereafter requested that Respondent remove from her personnel file the record of the action taken against her, but Respondent declined to do so. She then filed a grievance pursuant to the grievance-arbitration procedures in the parties' collective-bargaining agreement. Subsequently, she also filed a charge with the Board on June 27 alleging her suspension as being in violation of Section 8(a)(3) and (1) of the Act.<sup>9</sup>

By letter dated July 5, Respondent advised Clanton and the Unions that, by filing a charge with the Board, Clanton had elected to pursue "a legal or statutory remedy" and that, accordingly, under ar-

ticle V, section 5, of the collective-bargaining agreement,<sup>10</sup> she was barred from further processing her grievance. It further advised them that it considered the matter closed.<sup>11</sup>

With respect to the suspension, the Administrative Law Judge, as noted above, correctly found that Respondent's rule prohibiting employees from making false statements was *per se* unlawful and that, consequently, Clanton's statements in the UAW News, which in addition to her unlawful picketing formed the basis for her suspension, were protected by Section 7 of the Act. Accordingly, he found that, while Respondent may have had a valid reason for suspending Clanton, i.e., her unlawful picketing, her suspension was nevertheless unlawful since it was based, "in part," on the lawful protected activity engaged in by Clanton on behalf of Council 25.

Subsequent to the issuance of the Administrative Law Judge's Decision in this case, the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), had occasion to reconsider and clarify its position in "dual motivation" cases. In *Wright Line, supra*, the Board abandoned the "in part" test which for many years it had used to determine whether the Act had been violated in "dual motivation" cases. Under the *Wright Line* test, the General Counsel is required to "make a *prima facie* showing sufficient to support the inference that protected conduct was 'a motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.* at 1089. It is this analysis which we use to determine the legality of Respondent's conduct herein.

As noted above, the General Counsel has the initial burden of showing that Clanton's protected activity was a motivating factor in her suspension. The General Counsel, we find, has met that burden. The evidence clearly establishes, and Respondent does not deny, that the purportedly false statements made by Clanton in the UAW News—which we have found to be protected by Section 7 of the Act—were indeed a motivating factor in her suspension. This finding is further buttressed by the

<sup>6</sup> It appears that the employees were picketing during their nonworking time.

<sup>7</sup> According to Vogler, he told Clanton that he was "contemplating disciplinary action against her as a result of her participation in the picketing . . . and as a result of the letter that appeared in the UAW News."

<sup>8</sup> The "no-strike" clause, which is art. XIII, sec. 1, of the parties' collective-bargaining agreement, is set forth in the Administrative Law Judge Decision, sec. III.A.2.

<sup>9</sup> That charge was subsequently withdrawn on July 25 and later refiled in the instant case under a different theory.

<sup>10</sup> Art. V, sec. 5, in part, provides that "The sole remedy available to any employee for any alleged breach of this Agreement shall be pursuant to the Grievance Procedure, provided, however, that nothing herein shall prevent an employee from electing to pursue a legal or statutory remedy providing such election will bar any further or subsequent proceedings for relief under the Grievance Procedure."

<sup>11</sup> Despite Respondent's refusal to proceed on the grievance, an arbitration hearing was scheduled for December 4 to resolve the question of whether the suspension was arbitrable and, if so, to determine the grievance on its merits. The record does not reveal whether the arbitration hearing was ever held.

fact that the suspension letter given by Vogler to Clanton states that she was being suspended for having violated Respondent's unlawful work rule. Under these circumstances, it is clear that the General Counsel has made out his *prima facie* case as required under *Wright Line* and that the burden now shifts to Respondent to show that, even absent her protected activities, Clanton would nevertheless have been disciplined for her part in the unlawful picketing. The record evidence, in our view, clearly establishes that Respondent has met its burden.

As noted above, on May 19, Vogler sent Clanton a mailgram advising her that the mass demonstration which she had advocated in her UAW News article of May 10 was in violation of Section 8(g) of the Act. It is significant to note, however, that, while Respondent at this time warned Clanton of the illegal nature of the demonstration, it made no mention of the allegedly false statements made by her in the May 10 article nor did it warn her that such statements might be contrary to its work rules and could lead to discipline. Rather, its main concern, as is evident by a plain reading of that letter, related solely to the illegal nature of the demonstration. Furthermore, although these allegedly false statements were made by Clanton on May 10, no disciplinary action was taken against Clanton until after she actually participated in the unlawful picketing on May 24. Thus, the timing of the disciplinary action, coming as it did on the heels of the picketing, and the fact that, as evident from the May 19 mailgram, Respondent was concerned only with the illegal demonstration that was being planned by Clanton convince us that it was the latter's leadership role and participation in the unlawful picketing that precipitated her suspension.<sup>12</sup> Any false statements Clanton may have made in contravention of Respondent's unlawful work rule were, in our view, merely incidental factors which Respondent took into account when meting out such discipline. It is clear to us, however, that, in the absence of these factors, Clanton would nevertheless have been suspended for her other conduct related to the unlawful picketing. That employees Bergeron and Langford were not disciplined for

taking part in the unlawful picketing does not cast doubt on our finding since, as previously noted, in addition to her unlawful picketing, Clanton, unlike Bergeron and Langford, had been instrumental in organizing the picketing. In view of the above, we find that Respondent has met its burden as required under *Wright Line*, *supra*, by showing that Clanton would have been suspended even if she had not engaged in the conduct found protected herein.<sup>13</sup> Accordingly, we conclude that Clanton's suspension did not violate Section 8(a)(3) and (1) of the Act, as alleged.

Contrary to the Administrative Law Judge, we also find that Respondent's refusal, pursuant to the terms of the collective-bargaining agreement with the Unions, to process Clanton's grievance because she filed a charge with the Board did not violate Section 8(a)(4) and (1) of the Act. Article V, section 5, of the parties' collective-bargaining agreement contains a proviso which bars any further processing of a grievance once the grievant elects to pursue any legal or statutory remedy that might be available to resolve that grievance. This limitation, however, is imposed only on the right further to use the grievance-arbitration procedure, a right which arises by virtue of the contract;<sup>14</sup> it is not a

<sup>13</sup> We find no basis for our dissenting colleagues' claim that Respondent sought to exculpate itself at the hearing by attempting to "explain away" its "confession" that it disciplined Clanton for making false statements in addition to her unlawful picketing. Contrary to their assertion, a close reading of the record reveals no real or apparent inconsistencies in Respondent's testimony. At no time during the hearing did Respondent deny that it disciplined Clanton, in part, for having made false statements against it. Instead, the record reveals that, in addition to its purported "confession," Respondent further "confessed" that Clanton's participation and leadership role in the unlawful picketing was the principal reason for her suspension. Thus, we too, like our dissenting colleagues, are willing to take Respondent at its word, which is uncontradicted, that while it disciplined Clanton for making false statements as well as for her involvement in the unlawful picketing, it was this latter reason which formed the principal basis for her suspension. Clearly, had Respondent not "confessed" to having suspended Clanton, in part, for her false statements, the issue would have been quickly resolved since Clanton's suspension for having engaged in the unlawful picketing would undoubtedly have been lawful. Respondent's "confession" has, however, presented the Board with the classic dual motivation case and it is precisely because of this that a *Wright Line* analysis is necessary to determine if Respondent would have disciplined Clanton even in the absence of any protected activity she may have engaged in. In view of the evidence as described above and in light of Respondent's uncontradicted testimony, we are convinced that Clanton would have been suspended even if she had not made any false statements. Additionally, unlike our dissenting colleagues, we do not find significant the fact that the June 7 disciplinary letter fails to state specifically that Clanton's leadership role in the demonstration was a factor in her suspension. The weight of the credible evidence, as found by the Administrative Law Judge, reveals that Clanton was told by Vogler during the June 7 meeting that her role in organizing and promoting the unlawful demonstration had indeed been a factor in Respondent's decision to discipline her.

<sup>14</sup> It should be noted that the right of a party to pursue a grievance to arbitration is a contractual right and does not arise by operation of law. Thus, while a collective-bargaining agreement may or may not, depending on the wishes of the parties, contain a grievance-arbitration clause, it is clear that in the absence of such a clause a party cannot be compelled to arbitrate a grievance. *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368 (1974). See also *Moffitt Building Materials Company and Lumbermans Wholesale Company*, 214 N.L.R.B. 655 (1974).

<sup>12</sup> Our dissenting colleagues argue that our reliance on the timing of the discipline is without merit since, in their view, Clanton was also not put on notice that her conduct in organizing and participating in the unlawful demonstration could result in disciplinary action. In so doing, however, our colleagues seem to have ignored the fact that, in its May 19 mailgram, Respondent specifically advised Clanton of the illegal nature of the demonstration and further warned her that her conduct amounted to "an irresponsible act." Thus, while Respondent did not explicitly warn Clanton of any disciplinary measures that might be forthcoming as a result of her conduct, it is reasonable to assume that Clanton knew or should have known, by virtue of that mailgram, that her continued efforts to organize and eventually participate in the illegal demonstration might result in disciplinary measures being taken against her.

limitation on any legal or statutory rights a grievant may have. In fact, article V, section 5, of the contract expressly recognizes the right of an employee to pursue other legal or statutory means to resolve his or her grievance. Consequently, we find nothing impermissible in a clause, such as this one, which seeks to prevent duplicative adjudication by requiring an election of remedies, especially where the limitation being imposed is on a contractual right, rather than on a legal or statutory right. Accordingly, we find that, in refusing to process Clanton's grievance to the arbitration stage of the contract's grievance-arbitration procedure, Respondent was merely adhering to its contractual obligations and was in no way penalizing Clanton for having filed a charge with the Board. Under these circumstances, we conclude that Respondent did not violate Section 8(a)(4) and (1) of the Act,<sup>15</sup> as found by the Administrative Law Judge.

It is also apparent from the above facts, and we so find, that Respondent, as found by the Administrative Law Judge, did not violate Section 8(a)(5) and (1) of the Act by refusing to process Clanton's grievance since, in refusing to do so, Respondent was merely enforcing a provision of its contract with the Union, which it was entitled to do.<sup>16</sup>

In view of the above findings, we shall, with the exception of the 8(a)(1) finding relating to the unlawful work rule, dismiss the complaint against Respondent St. Joseph Hospital Corporation.

<sup>15</sup> We find our dissenting colleagues' reliance on *Globe Manufacturing Company*, 229 NLRB 1025 (1977); *Whale Oil Company, Inc.*, 169 NLRB 51 (1968); and *ITO Corporation of Rhode Island, Inc.*, 246 NLRB 810 (1979), to be clearly misplaced. In *Globe Manufacturing Company*, the Board found that an employer had violated Sec. 8(a)(4) and (1) of the Act by denying an employee's request for reinstatement because he had filed a charge with the Board, and in *Whale Oil Company*, the Board found that an employer's refusal to process an employee's grievance because he had filed a charge with the Board violated Sec. 8(a)(4) and (1) of the Act even though the union therein had acquiesced in the employer's conduct. Similarly, in *ITO Corporation*, the Board found that a respondent union had violated Sec. 8(b)(1)(A) of the Act by refusing to allow one of its members access to its established grievance procedure because he had filed a charge with the Board. In those cases, however, the refusal by the named respondent to process the "formal or informal" grievance was not based on the respondent's reliance on a valid election of remedies clause in a contract, such as the one herein, which waived only an employee's contractual right to further process a grievance when and if an employee elected to pursue other statutory or legal relief. Further, in none of these cases was the named respondent acting in accordance with a contractual obligation in refusing to process the grievance. Indeed, with the exception of *Globe Manufacturing Company*, in which there was no collective-bargaining agreement, the respondents in *Whale Oil Company* and *ITO Corporation* were clearly in breach of their contractual obligations which required them to process said grievances. In view of the foregoing, we find the aforesaid cases clearly distinguishable from the instant case and, therefore, not controlling.

<sup>16</sup> In order to make out what they perceive to be an 8(a)(5) violation, our dissenting colleagues first write the election of remedies provision out of the contract, and then find a violation based on Respondent's having availed itself of that provision. We find nothing in the Act to authorize such a course of action.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, St. Joseph Hospital Corporation, Flint, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Publishing, maintaining, or enforcing any rule of conduct which unlawfully limits the rights of its employees to make statements relating to wages, hours, working conditions, or other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Post at its general hospital in Flint, Michigan, copies of the attached notice marked "Appendix."<sup>17</sup> Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that Cases 7-CG-15(1) and 7-CG-15(3) be, and they hereby are, severed from Case 7-CA-15381 and that Respondent Unions in the CG cases, their officers, agents, and representatives, shall take the action set forth in the Administrative Law Judge's recommended Order in those cases.

IT IS FURTHER ORDERED that the remainder of the complaint in Case 7-CA-15381 be, and it hereby is, dismissed in its entirety.

MEMBERS FANNING and JENKINS, concurring in part and dissenting in part:

We agree with our colleagues' and the Administrative Law Judge's finding that Respondent St. Joseph Hospital Corporation violated Section

<sup>17</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

8(a)(1) of the Act by maintaining and giving effect to an unlawful work rule prohibiting employees from making merely false statements. Further, while we agree with our colleagues that the legality of Clanton's suspension must be viewed in light of the Board's recent Decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), we do not agree with their conclusion that Clanton's suspension did not violate Section 8(a)(3) and (1) of the Act. Nor do we agree with their finding that Respondent's refusal to process Clanton's grievance did not violate Section 8(a)(4) and (5) of the Act.

Under the Board's *Wright Line* test, the General Counsel, as our colleagues correctly point out, is required to make a *prima facie* showing that an employee's protected activity was a "motivating factor" in an employer's decision to discipline that employee. Once the General Counsel has made such a showing, the burden then shifts to the respondent who must show that, even absent any protected activity, the employee would nevertheless have been disciplined. We agree with our colleagues that the General Counsel has made a *prima facie* showing that Clanton's protected activity was a motivating factor in Respondent's decision to suspend her. However, contrary to our colleagues, we would further find that Respondent has not met its burden of showing that Clanton would have been suspended even if she had not engaged in any protected activity.

The undisputed facts reveal that, while Respondent may have been concerned with the illegal picketing engaged in by its employees, it nonetheless took no disciplinary action against two other employees, Bergeron and Langford, who, along with Clanton, had been identified as having participated in the unlawful picketing. Although Respondent claims that evidence available to it did not show that either Bergeron or Langford had organized or been leaders in the picketing, Respondent's June 7 disciplinary letter to Clanton merely states that Clanton had violated article XIII of the collective-bargaining agreement, the no-strike clause. Under the facts known to Respondent at the time, the same was true regarding Bergeron and Langford. Accordingly, the distinction relied on by Respondent is not supported by the terms of the letter. Instead, Respondent, as testified to by Vogler, chose to discipline only Clanton because, unlike Bergeron and Langford, she had engaged in other conduct such as the publication of the article in the UAW News which was critical of Respondent. Thus, had Clanton not made the purportedly false statements—which our colleagues and we agree was protected activity—she would have escaped disci-

pline, as did Bergeron and Langford.<sup>18</sup> Accordingly, we would find that Respondent has not met its burden of showing that Clanton would have been disciplined even if she had not engaged in protected activity and that her suspension therefore violated Section 8(a)(3) and (1) of the Act, as alleged.<sup>19</sup>

Contrary to our colleagues, we agree with the Administrative Law Judge's determination that the election of remedies section in article V, section 5, of the collective-bargaining agreement<sup>20</sup> is unenforceable insofar as it precludes the processing of grievances where concurrent unfair labor practice charges have been filed. In addition to the reasons set forth by the Administrative Law Judge, we rely on clear precedent establishing that the existence of pending unfair labor practices may not be used as the basis for refusing to consider an employee's formal or informal grievance,<sup>21</sup> even where the employee's representative has acquiesced in the employer's conduct.<sup>22</sup> Such a provision, in our view, is invalid and unenforceable insofar as it seeks to place limitations on an employee's statutory right to have full and unimpeded access to the Board. Consequently, Respondent's attempt to enforce that provision against Clanton for having exercised her statutory right to file a charge with the Board is, in our view, violative of Section 8(a)(4) and (1) of the Act,<sup>23</sup> as found by the Administrative Law Judge.

<sup>18</sup> We find the majority's reliance on the timing of the discipline to be without merit. Although no disciplinary action was taken against Clanton until after the unlawful picketing occurred, neither did Respondent warn Clanton that such discipline could result, although it was aware on May 19, prior to the picketing, that Clanton was organizing such picketing for May 23. It begs the question to argue, as the majority does, that Clanton would not have been disciplined if she had not engaged in that unprotected picketing. That might be so, but that is not the test. The test is not whether unprotected activity played a role in the disciplinary decision but whether protected activity was a motivating factor.

<sup>19</sup> We are not as easily persuaded, as is the majority, that Respondent's later attempt to explain away its confession that Clanton was disciplined for "vicious, false or malicious statements," as well as for violation of the no-strike clause, was not simply a self-serving attempt to exculpate itself. We are willing to take Respondent's word at the time for its motivation; it knows better than we what its reasons were, and better then than now. Had Respondent actually relied on Clanton's leadership role in the demonstration, its June 7 letter could have easily been drafted to so state. This it clearly did not do.

<sup>20</sup> The provision in question, art. V, sec. 5, is fully set forth in fn. 10, *supra*.

<sup>21</sup> *Globe Manufacturing Company*, 229 NLRB 1025 (1977).

<sup>22</sup> *Whale Oil Company, Inc.*, 169 NLRB 51 (1968). It is irrelevant that a union's acquiescence in a respondent's unlawful conduct is on an *ad hoc* basis or is embodied in a bargaining agreement. Indeed, the institutionalization of discriminatory practices should not thereby serve to legitimize such misconduct.

<sup>23</sup> Although the majority correctly points out that in the absence of a grievance-arbitration clause parties to the bargaining agreement may not be compelled to arbitrate disputes, it is clear that the parties to the instant bargaining agreement did negotiate grievance-arbitration clauses. The fact that additional, discriminatory restrictions on such grievance-arbitration procedures were jointly negotiated does not absolve Respondent of its 8(a)(4) misconduct. See *Whale Oil Company*, *supra* at 54. See also *ITO Corporation of Rhode Island, Inc.*, 246 NLRB 810, 812-813 (1979).

Inasmuch as we would find the election of remedies section of the bargaining agreement unenforceable, we would also find, contrary to our colleagues, that Local 2635's request to proceed with Clanton's grievance was appropriate based on rights under the collective-bargaining agreement.<sup>24</sup> Accordingly, Respondent's refusal to do so, in our view, amounted to a failure to abide by the terms and conditions of that contract and consequently constituted a violation of Section 8(a)(5) and (1) of the Act.<sup>25</sup>

<sup>24</sup> In this regard, we note the existence of a severability clause in the instant bargaining agreement, stating:

Any section of this Agreement which is ruled inconsistent with present or future state or federal laws or statutes shall become null and void without effect on the remaining sections. Should such a section be declared null and void in final action from whose judgement [sic] no appeal has been taken, upon written request of either party, the parties will meet to negotiate the matter.

Therefore, under the bargaining agreement's severability clause only sec. 5 of the grievance-arbitration procedure would, in our view, be considered null and void, and not the remaining sections of that article.

<sup>25</sup> Our colleagues protest that we would find the provision illegal and that we then, apparently from perversity, refuse to acknowledge that provision as a defense to what would otherwise be a plain refusal to abide by the contract's grievance procedure. We agree that we do so. Having found the provision a nullity, we would, of course, treat it as such. The majority's reaction, perhaps, stems from their refusal to perceive additional underpinnings for our finding the provision itself is bad. The provision, in our view, is not unlawful simply because it requires an employee to select from among different forums. It requires the employee to waive rights he may have in one forum but not in the other. Item: An employee may perceive unlawful discrimination where there is none, but that employee may nonetheless have a perfectly sound case under the contract, one which the majority would require be surrendered should the employee wish to test the unfair labor practice aspect of the case.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT publish, maintain, or enforce any rule of conduct which unlawfully limits the rights of our employees to make statements relating to wages, hours, working conditions, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

#### ST. JOSEPH HOSPITAL CORPORATION

#### DECISION

#### STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge: The original charges in Cases 7-CG-15(1) and 7-CG-15(3) were both filed by St. Joseph Hospital Corporation on

June 9, 1978. An order consolidating cases, consolidated complaint and notice of hearing thereon was issued on June 30, 1978, alleging that Local 2635, American Federation of State, County and Municipal Employees, AFL-CIO, and Council 25, American Federation of State, County and Municipal Employees, AFL-CIO (herein sometimes called Unions), had picketed in violation of Section 8(g) of the Act.

The charge in Case 7-CA-15381 was filed by Beverly J. Clanton;<sup>1</sup> president of Local 2635, American Federation of State, County and Municipal Employees, AFL-CIO on July 28. A complaint thereon issued on August 25, 1978, alleging that St. Joseph Hospital Corporation (herein sometimes called the Employer) violated Section 8(a)(3) and (1) of the Act as detailed below.

Answers were timely filed by all Respondents and on August 25 an order consolidating cases and rescheduling hearing was issued in the above cases. The hearing opened on September 18, 1978, and adjourned until October 19, 1978.

At the hearing on September 18, 1978, the complaint was amended to add an 8(a)(1) and (3) allegation based on the Employer's refusal to process a grievance filed by Clanton because she had filed an unfair labor practice charge with the Board.

On October 3, 1978, based on an amended charged filed by Clanton in Case 7-CA-15381, counsel for the General Counsel filed a motion to amend the complaint to add a violation of Section 8(a)(1) in maintaining unlawfully broad rules and a violation of Section 8(a)(5) in the aforementioned refusal to process Clanton's grievance. Upon the resumption of the hearing on October 19, the General Counsel's motion to amend the complaint was granted. The substance of the additional allegations of the complaint were all denied by the Employer.

The hearing was held before me on September 18, October 19 and 26, all in 1978. Briefs have been filed by all parties which have been duly considered.

#### FINDINGS OF FACT

##### I. THE EMPLOYER'S BUSINESS

The Employer is a nonprofit general hospital located in Flint, Michigan. During the year ending December 31, 1977, the Employer had gross revenues in excess of \$500,000 and purchased and had shipped directly to its Flint, Michigan, hospital, from points outside the State of Michigan, linens, medicines, and other goods valued in excess of \$50,000. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

<sup>1</sup> It was stipulated at the hearing that by marriage Beverly Carr's name is now Beverly Clanton.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

## A. Facts

## 1. Background

In substance, the Unions are alleged to have picketed at the Employer's premises on May 23, 1978, without giving 10 days' prior notice thereof to the Employer and to the Federal Mediation and Conciliation Service as required by Section 8(g) of the Act.

The Employer is alleged to have issued a 2-week suspension in connection with the alleged picketing to Union President Beverly Clanton because she engaged in lawful activity on behalf of Local 2635; also that the Employer refused to process Clanton's grievance on the suspension, thereby violating Section 8(a)(1), (3), and (5) of the Act; finally, that Employer violated Section 8(a)(1) of the Act by publishing and maintaining unlawfully broad rules prohibiting protected Section 7 employee conduct.

2. The unfair labor practice allegations<sup>2</sup>

Since about 1973, the Unions have represented the Employer's service and maintenance employees under the collective-bargaining agreements, the most recent being a 3-year contract expiring August 18, 1979. Council 25 was also engaged in an effort to organize certain technical employees of the Employer and a National Labor Relations Board election was scheduled for May 25, 1978.<sup>3</sup>

In order to promote support for this organizational effort, Clanton sought out the assistance and participation of other unions in conducting what was described by the Unions as a "demonstration," to be conducted at the Employer's premises to rally employees to support the Union in the upcoming election. To this end, Clanton spoke with several union leaders and authorized the publication of an article bearing her name in the Flint UAW News-Local 599 Headlight Edition of May 10. (G.C. Exh. 12.) The article's thrust was to seek the assistance of UAW members for the proposed "demonstration" and much of the language was critical of the Employer. In pertinent part, it read, "The hospital administration has continually lied to, harassed, and even threatened to jail the union rep. at St. Joseph's Hospital."

On or about May 18, Jerry Vogler, the Employer's director of personnel and labor relations, came into possession of this article. Vogler had reservations about the legality of such a "demonstration," and, after consulting

with the president of the hospital and its legal counsel, sent a mailgram to Clanton on May 19, reading:

We have been informed that your union is urging a mass demonstration at the hospital on May 23, 1978. As you well know, Section 8(g) of the National Labor Relations Act makes it an unfair labor practice to picket a health care facility, without notifying the facility in writing at least 10 days in advance. No such notice has been given to this hospital. Please be advised that the hospital considers your call for a mass demonstration to be an irresponsible act and will take appropriate action to ensure that it is able to continue to provide quality patient care. [G.C. Exh. 13.]

On May 20, the Flint Journal published an account of the proposed demonstration, identifying Clanton as being involved in the demonstration, and quoting her, as to the purpose of the demonstration, in soliciting employee support for the May 25 election (Emp. Exh. 6).

The parties stipulated that on the morning of May 23, about 5 a.m. agents of the Unions walked on the sidewalks surrounding the Employer's premises with signs in their hands. In addition to the Unions, other unions involved in this activity were the Firefighters, Postal Workers of America, UAW Locals, and other AFSCME locals. The activity lasted all day until about 4:30 p.m. in numbers of up to 50 participants. Some carried placards bearing such legends as "Justice, Dignity, and Security"; "Local 825 AFSCME"; "AFL-CIO Local 2635 AFSCME"; "Put your rights in writing"; "Firefighters Local 352 in Support of AFSCME." Among those representing Local 2635 were Clanton, Daryl Bergeron, executive board member, and Trudy Langford, another union official, who all remained throughout the day.

It is undisputed, and the General Counsel makes no contention, that there was any interruption caused by this activity to the normal operations of the hospital.<sup>4</sup> Nor does it appear that any employees of the Employer were engaged in this action at times when they normally would have been working.

On May 26, the day after the election, Vogler spoke to Clanton, Bergeron, and Langford to advise them that he was contemplating taking disciplinary action against them. Upon his return from vacation on June 5, Vogler reviewed the matter and decided to discipline only Carr. Vogler testified that while all three were involved in the activity on May 23, there was no evidence that Bergeron or Langford were involved in its promulgation or organization, as was Clanton.

On June 7, Vogler called a meeting for the purpose of disciplining Carr, attended by himself and Supervisor Cliff Kittle. Clanton and Chief Steward Sandra Lynn also attended. Vogler distributed a letter dated June 7 from himself to Clanton reading:

<sup>4</sup> One truckdriver supplier did stop to inquire if it was all right to pass, and was told that it was not a strike and he could go in.

<sup>2</sup> There is conflicting testimony regarding certain allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities; the probabilities in light of other events; corroboration or lack of it, and consistencies and inconsistencies within the testimony of each witness, and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness I rely specifically upon his demeanor and make my findings accordingly. And, while apart from considerations of demeanor I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop and Malco Inc., d/b/a/ Walker's*, 159 NLRB 1159, 1161 (1966).

<sup>3</sup> All dates refer to 1978 unless otherwise indicated.

This is the follow-up of our discussion of Friday, May 26, 1978, in which you were put on notice that the Hospital is contemplating taking disciplinary action for your involvement and participation in the demonstration which took place on May 23, 1978. We have completed our investigation and have found your conduct to be in violation of Article XIII, Section I of the Collective Bargaining Agreement and the Hospital's Rules of Conduct (False Statements: Employees must not make vicious, false or malicious statements about employees of the Hospital. Undesirable Conduct: Undesirable conduct or conduct unbecoming a St. Joseph Hospital employee). This is to notify you that you are hereby suspended for a period of 2 weeks.

However, in view of the unique circumstances presented in this case and your overall work record at the Hospital, the serving of the suspension is being suspended. The disciplinary action will however be entered in your personnel file. You are also put on notice that in the future any such violation of this Article could result in discharge.<sup>5</sup>

Article XIII is the "No-Strike Clause" of the contract which provides, in section I:

Both the Union and the Hospital recognize the nature of the service furnished by the Hospital, and the importance of its responsibility to render continuous service to the public, and that nothing should interfere to prevent the Hospital from providing this continuous service. The parties further recognize that procedures have been provided in this agreement for settlement of grievances. Therefore, during the life of this Agreement the Union shall not cause or permit its members to cause nor shall any member of the Union or any bargaining unit employee, take part in any strike, sympathy strike, slowdown, interference of patient care or stoppage of the Hospital's operations or picket the Hospital (because of a labor dispute with the Hospital).

Under the provisions of article VII of the contract captioned "Rules and Discipline," the Respondent has the right to adopt, revise, and enforce rules and regulations. Article VII also gives the Union the right to discuss, protest, and grieve over the rules under procedures set out therein, but not to prevent their adoption.

Thereafter, at the June 7 meeting, there was some discussion of the factors considered by Vogler in reaching this decision, as set out in the letter.

On June 8, Clanton filed a written grievance, contending that her suspension violated the contract. Employer did not respond and a grievance appeal was filed by Clanton on June 13. A third-step grievance meeting was held on June 20.

At the June 20 grievance meeting Vogler and Greg Knuth, the Employer's wage and hour manager, represented the Employer, while Joseph McManus, director of organizing for Council 25, Dennis Owens, staff repre-

sentative of Council 25, and Carr were there for the Union.

McManus requested that the disciplinary action be removed from Clanton's file and Vogler declined. McManus asked why Clanton had been singled out for disciplinary action, since others had been involved, namely, Langford and Bergeron. Vogler responded that he had no evidence that either of those individuals was involved in organizing or promoting the activity. Vogler also denied the suggestion that any standard of conduct was being imposed on Clanton as a union officer, noting that Bergeron and Langford also were union officials. While McManus and Owens testified that Vogler commented that Clanton was singled out for disciplinary action because she was a union leader, I credit the corroborated testimony of Vogler and Knuth, that Vogler did not so state, particularly in view of McManus' limited recollection of this meeting.

In responding to inquiry about the basis for the disciplinary action taken against Clanton, Vogler stated that Clanton's activity in organizing and promoting the activity of May 23 violated the no-strike and picketing provisions of the contract, the pertinent provisions of which are set forth above, and that her organizational activity was disclosed by the UAW newsletter as well as interviews given to the media on May 23; second, that she had violated the hospital "Rules of Conduct" relating to "False Statements" and "Undesirable Conduct" by the article appearing in the UAW newsletter of May 10 bearing her name.

Vogler testified in the following exchange:

Q. In your letter of June 7th, you mentioned two rules. One rule is vicious, false or malicious statements and the other—and that is entitled undesirable conduct. Is it your testimony that the one statement in the letter about threatening to jail the union rep. was the only statement that you refer to in both of those contexts.

A. Yes.

Q. You had reference to nothing else?

A. As I pointed out the last paragraph which was a call to arms for the picketing, it was also talked about as being something I was troubled with in the letter. It was the statement about threatening to jail the union representative of the hospital that I felt was particularly malicious.

Q. So is it true that when you charged Mrs. Clanton with a false statement as undesirable conduct, you were talking about the same statement?

A. Yes.

McManus made it clear at this meeting that the Unions intended to press for the arbitration of Clanton's grievance and the meeting ended on that note.

On June 27, Clanton filed an unfair labor practice charge (Case 7-CA-15304) alleging her suspension as an 8(a)(3) violation. The charge was withdrawn on July 25, however, this suspension was ultimately alleged in the instant case as an unfair labor practice charge on a somewhat different theory. Upon the filing of the unfair labor practice charge by Clanton, the Respondent took the po-

<sup>5</sup> It is undisputed that Clanton's suspension was never served.

sition that it was no longer obliged to process the grievance, since, under the contract, electing to pursue the unfair labor practice charge resulted in barring relief under the grievance procedures of the contract.<sup>6</sup> The Union has persisted in seeking arbitration despite the Respondent's position. An arbitration was set for December 4, to determine whether or not the suspension is arbitrable and, if so, to determine the grievance on its merits.<sup>7</sup>

## B. Discussion and Analysis

### 1. Activity of May 23

It is the position of the General Counsel and the Employer that the May 23 activity described by the Unions as a "demonstration" was in reality picketing in violation of Section 8(g) of the National Labor Relations Act.<sup>8</sup>

The Unions take the position that the activity of May 23 was merely a demonstration designed to promote employee support for Council 25 in a representation election scheduled for May 26. The record herein discloses that the participants, involving from 5 to 50 individuals, walked in groups along the sidewalks surrounding the hospital and that they carried placards bearing various legends. In my opinion, the activity engaged in by the Unions on May 23 clearly constitutes picketing as proscribed in Section 8(g) of the Act. *District 1199, National Union of Hospital and Health Care Employees, RWDSU,*

<sup>6</sup> Sec. 5 of article V (Grievance Procedure) reads:

Any Agreement reached between Management and the Union is binding on all workers affected. The sole remedy available to any employee for any alleged breach of this Agreement shall be pursuant to the Grievance Procedure, provided, however, that nothing herein shall prevent an employee from electing to pursue a legal or statutory remedy providing such election will bar any further or subsequent proceedings for relief under the Grievance Procedure.

<sup>7</sup> Sec. 4 of art. VI (Arbitration) reads:

*Powers of the Arbitrator:* The Arbitrator shall have no power to add to, subtract from, alter, or modify any of the terms of this Agreement or any of the functions or responsibilities of the parties to this Agreement. He shall have no power to establish wage scales or change any wage.

He shall have no power to substitute his judgement for that of the Hospital as to the reasonableness of any such practice, policy, or rule, unless such policy, practice, or rule is in violation of a specific Article and Section of this Agreement. His powers shall be limited to deciding whether the Hospital has violated the express Articles and Sections of this Agreement, it being understood that any matter not specifically set forth herein remains within the reserved rights of the Hospital. It is further specifically understood that the Arbitrator:

a. Shall have no power to substitute his discretion for the Hospital's discretion in cases where the Hospital is given discretion by this Agreement.

b. He shall have no power to rule on any claim or complaint for which there is another remedial procedure or forum established by law or regulation.

<sup>8</sup> Sec. 8(g) provides:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than 10 days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

*AFL-CIO (United Hospitals of Newark)*, 232 NLRB 443 (1977).<sup>9</sup>

The Unions also contend that even assuming that the activity was picketing, it was not picketing in violation of Section 8(g). It is undisputed that the Employer's employees engaged in the picketing only during their off time and not during their work shifts, and that there was no disruption of any services with respect either to the Employer or its suppliers. However, the Board has held that picketing of a health care institution regardless of effect is proscribed by Section 8(g), and I am bound by the Board's holding. Thus, the Board has held that picketing "... is proscribed by Section 8(g) even though it does not result in a work stoppage or other disruption of the delivery of health services."<sup>10</sup>

This record shows that the object of the picketing was to encourage employees to vote for Council 25 at the upcoming representation election. According to the Respondent, this was not a "labor dispute," but a "representation matter" and picketing must involve a "labor dispute" before any 8(g) violation can be found. This contention is based on the theory that, unless this were so, there would be no purpose to the notice requirement to the Federal Mediation and Conciliation Service provided in Section 8(g), since without a "labor dispute" the Federal Mediation and Conciliation Service will not involve itself in the resolution of the matter. Whatever merit there may be in such reasoning, the Board has concluded that picketing however conducted and for whatever reason is illegal unless accompanied by proper notice under the provisions of Section 8(g). The Board has spoken with unmistakable clarity in ruling that Section 8(g) requires such notice "... prior to engaging in any form of picketing so that the health care institution may have time to prepare for possible disruptions of patient care. Such restraint is reasonable and does not result in a construction of Section 8(g) which is inconsistent with the first amendment."<sup>11</sup>

### 2. Employer's "Rules of Conduct"

The General Counsel contends that the "False Statements" portion of the Employer's "Rules of Conduct," set out in the complaint and reiterated above, is "*per se*" unlawful because it is not limited either as to employees' worktime or to the Employer's workplace, and because the Employer may under this rule prohibit an employee from making statements that are merely false which can be lawfully made as well as statements which are malicious and may not be lawful.

The Employer contends that the Unions are precluded from objecting to these rules since the rules were established pursuant to contract provisions giving the Union the right to protest and grieve over them. However, these provisions do not require union agreement to the rules prior to implementation. Moreover, the Unions' failure to grieve concerning these rules do not in my

<sup>9</sup> The facts disclose that more than individual activity was involved since the Unions organized, sponsored, and participated in the picketing and were responsible for it.

<sup>10</sup> *District 1199, supra*.

<sup>11</sup> *District 1199, supra* at 445.

opinion constitute an agreement by the Unions to their establishment.

The Employer also argues that whatever the legality of this rule, as applied to industry generally, there exists in the health care industry special health care considerations which legitimize such rules because of the possible disruption to patient care. However, these contentions for establishing an exception to the general rule for the health care industry are not supported by the record, and I perceive no compelling reason, absent evidentiary justification therefor, for carving an exception to the general principle regarding this type of rule.

The current state of the law regarding such rules is that statements which are merely false are protected within the area of concerted activity. Had the rule in question merely prohibited "malicious" statements as opposed to statements which were merely false, a different question would have been raised. However, since employees while engaged in concerted activity have a protected right to make false, misleading, or inadequate statements, any rule denying these protected rights is "*per se*" unlawful. *American Cast Iron Pipe Company*, 234 NLRB 1126 (1978); *El Mundo Broadcasting Corporation*, 108 NLRB 1270 (1954).

This conclusion also finds support in *William C. Linn v. United Plant Guard Workers of America, Local 114, et al.*, 383 U.S. 53, 62-63 (1966), wherein the Court found, in a labor management context, that Section 8(c) was designed to protect free debate:

We acknowledge that the enactment of §8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management. And, as we stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." *New York Times Co. v. Sullivan*, 376 U.S.C. 254, 270 (1964). Such consideration likewise weigh[sic] heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.

In conclusion, I find that the rule captioned "False Statements" to be *per se* unlawful as overly broad.<sup>12</sup>

### 3. Clanton's suspension

It is the General Counsel's contention that Clanton was suspended because she had engaged in the protected activity of campaigning for the purpose of promoting support for Council 25 in the May 26 election. The General Counsel concedes, as indeed it must, that the picketing itself was illegal as an 8(g) violation, but contends that the promotional activity preceding the picketing of May 23 was not illegal and that it was for this protected activity that she was unlawfully discharged. The General Counsel also argues, correctly, that even if the picketing itself was one of the reason for the suspension at least

one other reason for Clanton's suspension was that she engaged in protected activity prior to the day of the actual picketing.<sup>13</sup>

An examination of this record makes it apparent that Clanton was suspended, at least in part, because of certain statements which appear in the May 10 Flint UAW News, particularly that portion wherein Clanton accused the Employer of threatening to jail the union representative at the hospital.<sup>14</sup> As noted above, in discussing the legality of the "False Statements" rule itself, such statements are, in a labor relations context, protected under the holding in the *Linn* case. Consequently, since the Employer in suspending Clanton was acting pursuant to a rule which was itself "*per se*" illegal, her suspension was also illegal in violation of Section 8(a)(3) of the Act, since she was engaged in the protected activity of attempting to induce employee support for the upcoming election. Moreover, nothing in this record discloses that anything said or written by Clanton was in fact, "malicious" so as to be unprotected within the meaning of the *Linn* case.

The Employer also contends that since the picketing was illegal, Clanton's activity in promoting this illegal act is unprotected activity and that any disciplinary action taken by the Employer was therefore justified. The short answer to this contention is that while this position may be correct theoretically, the undisputed facts of this case show that Clanton was suspended, at least in part, for violating a rule which I have concluded is *per se* unlawful. This makes her suspension unlawful.

Moreover, the fact that the demonstration being promoted by Clanton turned out to be illegal 8(g) picketing does not render illegal all of Clanton's activity on behalf of Council 25 prior to the picketing, in the course of promoting the election.

In summary, I conclude that Clanton was suspended, in part, pursuant to a rule which is "*per se*" unlawful and that her suspension violates Section 8(a)(3) and (1) of the Act.

### 4. The refusal to process Clanton's grievance

The General Counsel contends that by refusing to process Clanton's grievance, the Employer violated Section 8(a)(1), (3), (4), and (5) of the Act. The Respondent contends that under the grievance and arbitration provisions of the contract, recited above, Clanton, having elected to file an unfair labor practice charge, is thereafter barred from any further proceedings under the grievance procedures of the contract.

The provisions of the contract are clear. There is no ambiguity in the language of the contract. The issue is whether or not the contract provision can be applied by the Employer to deny Clanton access to the grievance procedures of the contract. In other words, the question is whether or not the Respondent violated the Act by

<sup>12</sup> The rule captioned "Undesirable Conduct" is not alleged as *per se* unlawful and no finding is made with respect thereto.

<sup>13</sup> Well-established Board and court precedent makes it clear that discrimination, even though imposed only in part for a discriminatory reason, violates the Act. In this case, the fact that there may have been other valid reasons for the suspension is irrelevant.

<sup>14</sup> As noted earlier, Vogler testified that these remarks violated both the "False Statements" and "Undesirable Conduct" rules.

enforcing against Clanton a contract provision requiring an employee to forfeit a contractual right to grieve because the employee has elected to pursue remedial relief under the unfair labor practice procedures of the National Labor Relations Board. I believe that such a provision is unenforceable.

In substance, the Union and the Employer have waived for employees access to the grievance procedures of the contract if an employee elects to file an unfair labor practice charge. In my opinion, an employee's right to file an unfair labor practice charge contending that his 8(a)(1) or (3) rights have been violated cannot be waived for him by the parties to the contract. I am aware of the Board and court cases applying the principle first enunciated in the *Collyer* case.<sup>15</sup> In those cases, the Board majority took the position that it would defer to the grievance and arbitration provisions of a contract even though remedial relief was also available as an unfair labor practice charge. However, the Board has specifically rejected the deferral principle where employees' rights under Section 8(a)(1) and (3) or Section 8(b)(1)(A) and (2) of the Act are involved, and held that attempts to limit employees' access to the facilities of the National Labor Relations Board, where such individual rights are involved, would not be countenanced despite the existence of the grievance procedure and the contract.<sup>16</sup>

In my opinion, the basic responsibility for enforcing the National Labor Relation Act rests with the National Labor Relations Board and where the individual rights of employees protected thereunder are involved, the right of access of employees to the procedures of the Board must remain unimpaired. This contract grievance provision impairs that right. But how is this so, one may ask, when the contract does not purport to deny an employee access to the Board? All the contract does is to deny an employee access to the grievance procedures of the contract should he or she elect to utilize the procedures of the Board. Forcing an employee to such an election, however, requires the employee to pay a price for doing what the Congress has determined to permit him to do by denying him the benefits of the contract grievance procedure if he elects to exercise his legal right with the Board. He cannot be forced to make such a choice. An employee's right to use the Board's procedures must be unfettered, and he may not be required to

sacrifice a contractual right in order to exercise it, even though it is he who makes the election.<sup>17</sup>

While the Supreme Court has never passed on the precise issues raised in the instant case, it has passed on a similar issue arising under Title VII of the Civil Rights Act of 1964. The rationale of that case is directly applicable to the instant case. In the *Alexander* case,<sup>18</sup> the Supreme Court decided that a racial discrimination grievance filed under the contract, which was processed and rejected by an arbitrator, did not preclude litigation under Title VII for the same discrimination. The Supreme Court concluded that distinctions can and should be drawn between contractual rights and statutory rights, even where the facts are the same in both actions. This concept has greater validity in the instant case where several reasons have been asserted by the Employer for Clanton's suspension, some of which are contractual in theory, relating to the no-strike clause of the contract and work rules, while others are clearly statutory, i.e., organizing illegal picketing under Section 8(g) of the Act. Since an underlying issue in the grievance would require a determination as to the legality of the picketing under Section 8(g), the arbitrator would not be competent to pass on that aspect since it is extra-contractual.

It is also significant to note that this is not merely a question of deferral pending an arbitration, where the authority to review is being retained by the Board. In the instant case, if it is determined that this contract provision is valid, the employee will be permanently damaged, since he will be permanently barred from filing any grievance under the contract.

In summary, I am persuaded that, by enforcing the contract to deny Clanton full access to the grievance procedures of the contract because she had filed an unfair labor practice charge, the Employer is essentially imposing a penalty on Clanton for having filed the unfair labor practice charge, in violation of Section 8(a)(1) and (4) of the Act.<sup>19</sup>

However, I am unable to perceive how the Employer has refused to bargain with the Union by refusing to process Clanton's grievance. First, the charge was filed by Clanton and bargaining relief is unavailable to individual charging parties. Second, I am unable to perceive how the Employer has refused to bargain with the Unions by refusing to process Clanton's grievance, since the Employer was simply enforcing a provision of the contract to which the Unions were party. Under the clear terms of the contract it was entitled to do this, despite the belated protestations of the Unions that the contract provision in issue should not be enforced.

<sup>15</sup> *Collyer Insulated Wire, A Gulf and Western System Co.*, 192 NLRB 837 (1971).

<sup>16</sup> Of course Chairman Fanning and Member Jenkins have never adhered to the *Collyer* principle. Then-Chairman Murphy, in joining them to reject the *Collyer* principle in 8(a)(1) and (3) and 8(b)(1)(A) and (2) type cases, stated in *General American Transportation Corporation*:

In sum, I shall continue to defer to arbitration those cases involving only contract interpretation issues, as in *Roy Robinson Chevrolet*. But I shall not defer to arbitration in those cases which involve unfair labor practice allegations affecting individual rights under Section 7 of the Act. Since the instant case is of the latter type, being concerned with whether Respondent's motive in discharging employee Soape was his union or other protected concerted activities, I find that the matter should not be deferred to arbitration and I agree with my colleagues' finding that Respondent violated Section 8(a)(3) and (1) by the said discharge. [228 NLRB 808, 813 (1977).]

<sup>17</sup> The Employer's contention that the matter is being processed to arbitration at present is not well taken. While it is true that the grievance is being processed, the Employer is taking the position that the grievance is no longer arbitrable because the unfair labor practice charge has been filed. Such limited employee access to the grievance procedure is still a denial of the employee's full access to the Board which should be available to him.

<sup>18</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

<sup>19</sup> While no 8(a)(4) allegation is set out in the complaint, the entire matter was fully litigated and an 8(a)(4) finding is fully warranted. I find it unnecessary to pass on whether or not the Employer's misconduct also violates Sec. 8(a)(3) of the Act, since the remedy would not be affected.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Unions and the Employer occurring in connection with the Employer's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that the Unions and the Employer have engaged in, and are engaging in, certain unfair labor practices, I shall recommend that they cease and desist therefrom, and take certain affirmative actions designed to effectuate the policies of the Act. However, since it appears that Clanton's suspension was not carried out, no backpay award will be made herein.

Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record in this case I make the following:

#### CONCLUSIONS OF LAW

1. St. Joseph Hospital Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. By picketing at the premises of St. Joseph Hospital Corporation without first giving 10 days' written notice to St. Joseph Hospital Corporation and to the Federal Mediation and Conciliation Service, the Unions have violated Section 8(g) of the Act. This conduct affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. By publishing, maintaining, and enforcing a rule of conduct ("False Statements") which unlawfully limits the right of employees to make statements relating to wages, hours, working conditions, or other terms and conditions of employment, the Employer has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By suspending Clanton for having violated the unlawful rule ("False Statements"), the Employer discriminated against Clanton in violation of Section 8(a)(3) and (1) of the Act.

6. By declining to process Clanton's grievance over her suspension, because that grievance was the subject matter of a charge pending before the National Labor Relations Board, the Respondent violated Section 8(a)(1) and (4) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>20</sup>

A. Respondents Local 2635, American Federation of State, County and Municipal Employees, AFL-CIO, and

<sup>20</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and

Council 25, American Federation of State, County and Municipal Employees, AFL-CIO, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Engaging in any strike, picketing, or other concerted refusal to work at the premises of St. Joseph Hospital Corporation, or any other health care institution, without timely notifying, in writing, any such health care institution and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act:

(a) Post at its business offices, meeting halls, and all other places where notices to its members are customarily posted copies of the attached notice marked "Appendix A."<sup>21</sup> Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by both Unions' authorized representatives, shall be posted by the Unions immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Unions to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Unions have taken to comply herewith.

[Recommended Order, section B, omitted from publication.]

become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>21</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX A

##### NOTICE TO MEMBERS

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT engage in any strike, picketing, or any other concerted refusal to work at the premises of St. Joseph Hospital Corporation, or any other health care institution, without timely notifying, in writing, any such health care institution and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

LOCAL 2635, AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

COUNCIL 25, AMERICAN FEDERATION OF  
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO